UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS UNION INTERNATIONAL, LOCAL 1192, AFL-CIO, CLC
(BUCKEYE FLORIDA CORPORATION, a Subsidiary of BUCKEYE TECHNOLOGIES, INC., and GEORGIA PACIFIC, LLC)

and

JIMMIE RAY WILLIAMS — Case No. 12-CB-109654

and

BUCKEYE FLORIDA CORPORATION, a Subsidiary of BUCKEYE TECHNOLOGIES, INC., and GEORGIA PACIFIC, LLC.

BRIEF *AMICUS CURIAE* OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO IN SUPPORT OF RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

On April 15, 2015, the National Labor Relations Board ("NLRB") invited interested *amici* to file briefs on the following questions:

1. Should the Board reconsider its rule that, in the absence of a valid union-security clause, a union may not charge nonmembers a fee for processing grievances? Should it adhere to or overrule *Machinists, Local No. 697 (H.O. Canfield Rubber Co.)*, 223 NLRB 832 (1976), and its progeny?

2. If such fees were held lawful in principle, what factors should the Board consider to determine whether the amount of such a fee violates Section 8(b)(1)(A)? What actions could a union lawfully take to ensure payment?

International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150" or "the Union") agrees with the Respondent that the Board should reconsider and overrule *Machinists Local Union No. 697*, and adopt a rule allowing unions to charge non-members a fee for grievance-processing. The Union argues further that that fee should be calculated at least in part based on the actual cost of processing grievances.

STATEMENT OF INTEREST

Local 150 represents over 15,000 employees actively working in various industries throughout northwest Indiana, northern Illinois, and eastern Iowa (Certification of James M. Sweeney dated May 27, 2015 (hereinafter "Sweeney Cert.") ¶ 3, attached hereto as Exhibit A). The Union also represents employees in the railroad derailment and construction industry in 39 states (*id.*).[1] The employers in these industries are not "carriers" under the Railway Labor Act, but are covered by the NLRA (*id.*). While the vast majority of these employees are Local 150 members, a number are fair share fee-payers under *Communications Workers of*

[1] These states include: Arizona, Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

America v. Beck, 487 U.S. 753 (1988) (*id.*). An increasing number of non-members in "Right-to-Work" states like Iowa, Indiana, and Georgia pay nothing to the Union at all (*id.*).

In 1947, Iowa was one of several states to pass one of the first so-called "Right-to-Work" laws. *See,* "Iowa Ban on Closed Shop," 20 LRRM 3007 (BNA, 1947) (approved and effective April 28, 1947). On February 1, 2012, Indiana adopted a "Right-to-Work" law. Ind. Code § 22-6-6, Titled, "Chapter 6. 'Right-to-Work'." Over half of the states in Local 150's railroad wrecking and construction jurisdiction are "Right-to-Work" states. *See, e.g.,* Ga. Code Ann. § 34-6-6, -7, -20 to -28 (West 2015). Moreover, the recently elected Governor of Illinois has proposed legislation which would authorize local government units to create "Empowerment Zones" that could include local "Right-to-Work" laws similar to those adopted by twelve counties in Kentucky. *Compare* "The Illinois Turnaround"[2] (including Jason Barclay, General Counsel to the Governor Memorandum re: "Permissibility of Employee Empowerment Zones Under Federal Law" (March 23, 2015)), *with* "Brief of the National Labor Relations Board as *Amicus Curiae* in Support of Plaintiffs," in *UAW Local 3047 v. Hardin County, Kentucky*, Case No. 3:15-cv-66 (filed April 17, 2015).

The duty of fair representation compels Local 150 to represent all employees equally regardless of their membership in the Union. *Del Costello v. Teamsters*, 462 U.S. 151 (1983); *Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998). Local 150 has frequently represented non-members with grievances under collective bargaining agreements negotiated and administered by the Union (*see, e.g.,* Sweeney Cert. ¶¶ 7, 8-10, 12, 16). Yet current Board law prohibits unions from charging non-members working in "Right-to-Work" states any fee whatsoever for grievance-processing. *See, e.g., Machinists Local Union No. 697 (H. O. Canfield*

[2] *Available at* http://www2.illinois.gov/gov/documents/compiledpacket.pdf.

Rubber Co.), 223 NLRB 832 (1976); *Hughes Tool Company*, 104 NLRB 318 (1953). This rule discourages employees from joining the union by allowing them to obtain all the benefits of union representation for free, and requires union members to bear a disproportionate burden of the costs of representation.

Local 150 has a significant interest in this case because the duty of fair representation compels it to represent non-members in grievance procedures in "Right-to-Work" states for free. The Union's resources generated by dues-paying members and fair-share fee-payers are taken by force of law to subsidize free-riders, weakening the Union and creating discord among the employees it represents. The Board should overrule *Machinists Local Union No. 697*, and allow unions in "Right-to-Work" states to assess non-members fees based at least in part upon the cost of the representation they receive.

STATEMENT OF FACTS

Employees represented by Local 150 who join the Union pay "base dues" (Sweeney Cert. ¶ 4). The amount of base dues depends on the member's history of employment, but the member must pay regardless of whether the member currently is working (*id.*). Such dues range from $20.50 per month for most industrial units; $23.50 per month for railroad industry workers; $25.50 per month for public sector employees; and, $41.00 per month for employees engaged in steel mill service work (*id.*). Construction industry members who generally earn higher wages pay the highest monthly base dues of $44.00. Members also pay "administrative" or "working" dues of 3 percent of their wages (*id.*). Non-members working outside of "Right-to-Work" states pay reduced "fair share" fees based upon the annual calculations undertaken by the Union as to what expenses are chargeable under *Beck* (*id.*). As the following examples show, the Union has no

ability to compel non-members in "Right-to-Work" states to contribute anything to the cost of their representation.

A. Iowa

Local 150's geographic jurisdiction extends to seven counties in Iowa that border the Mississippi River. In Des Moines County, Iowa, Local 150 represents both operating and stationery engineers at the American Ordnance operation of the Iowa Army Ammunitions Plant (IAAP) located in West Burlington, Iowa (Sweeney Cert. ¶ 8). For several years, Local 150 also represented the employees of Heckett MultiServ at its Plant 52 in Montpelier, Muscatine County, Iowa (*id.* at ¶ 5).

1. Heckett MultiServ

In 2000, a majority of the employees of Heckett MultiServ at its Plant 52 in Montpelier, Iowa, selected Local 150 as their representative in an NLRB election (Sweeney Cert. ¶ 5). In 2005, the Union again won majority support in a decertification election (*id.*). The vote was close, 34 to 33; and barely more than half the MultiServ employees ever joined the Union (*id.*). Local 150 negotiated and administered a contract covering this unit from July 1, 2002, through approximately June 30, 2006, when the employees voted to decertify the Union (Case No. 33-RD-865) (*id.*).

The Iowa MultiServ plant operated 24 hours a day, seven days a week, on what is known in the industry as a "21 Turn" (Sweeney Cert. ¶ 6). Such a schedule requires employees to work a rotating shift which changed weekly, enjoying irregular days off (*id.*). MultiServ maintained an attendance policy to enforce this unpopular work schedule (*id.*). The Union tried on several occasions to negotiate over the attendance policy without success (*id.*).

Throughout the Union's representation of the MultiServ unit, employee adherence to the Employer's attendance policy was a problem (Sweeney Cert. ¶ 7). The Employer routinely

disciplined employees for violation of its attendance policy (*id.*). Between 2002 and 2005, the Union filed numerous grievances on behalf of these employees, advanced at least fifteen to the second step of the grievance procedure, ten of which were referred to arbitration (*id.*). All these grievances settled in a manner favorable to the employees, who were represented in each instance by a salaried Local 150 Business Agent (*id.*). Each grievance involved several hours of staff time to investigate, decide which grievances warranted progressing through the upper steps of the grievance procedure, and negotiation of a resolution (*id.*). At that time, the Union's cost for a Business Agent was about $75.00 per hour (*id.*). Resolution of these fifteen grievances easily cost the Union's dues-paying members several thousand dollars (*id.*). None of the employees involved were Union members, and therefore, none of these employees paid anything for those services (*id.*).

2. American Ordnance

In April of 2014, Local 150 filed a grievance against American Ordnance alleging that the company lacked just cause to suspend two bargaining unit members over their operation of the boiler at the IAAP munitions plant (Sweeney Cert. ¶ 8). For years, one of the grievants has exercised his rights under the Iowa "Right-to-Work" law to refuse to become a dues-paying member of the Local and refuse to pay fair share fees (*id.*). (The Union had previously negotiated a settlement of a grievance on behalf of this employee while he was a member in 2010, but he dropped out of the Union and stopped paying dues shortly thereafter) (*id.*). As with all its grievances that proceed to arbitration, Local 150 provides legal representation through its in-house Legal Department in Countryside, Illinois, which is approximately two hundred thirty miles from West Burlington (*id.*).

In April of 2015, after many attempts by Local 150 Business Representative Ryan Drew to settle the grievance with American Ordnance had failed (at the "Step" meetings and many phone conversations and at least two other dedicated settlement meetings), the Union advanced the grievance to arbitration and an arbitration hearing was held in West Burlington (Sweeney Cert. ¶ 9). In preparing for the hearing, counsel for the Local 150 Legal Department spent two days including travel from Countryside to West Burlington (*id.*). Given the logistics involved with access to the munitions plant, the one day hearing was held at the local Comfort Suites hotel (*id.*). Post-hearing briefs were submitted in mid-May 2015 (*id.*).

Local 150 Business Representative Drew spent about 10-15 hours of work time in processing the American Ordnance grievance through arbitration (Sweeney Cert. ¶ 10). Based upon his 2014 compensation and other expenses, the cost to the Union of Mr. Drew's time is about $100.00 per hour (*id.*). Local 150's counsel spent about thirty-four hours of time in participating in settlement discussions, preparing for hearing, traveling to and from Iowa, trying the case, and writing the post-hearing brief (*id.*). Adding the cost of the hearing room, a hotel room for one night for in-house counsel, counsel's meals and mileage, and the arbitrator's fees to the time spent by Local 150 on the case has resulted to date in an approximate monetary cost to the Union of $7,850.00 (*id.*).

B. Georgia: Hulcher

Local 150 has multi-state jurisdiction in thirty-nine states for the purpose of representing employees in the railroad track construction, maintenance and derailment industries (Sweeney Cert. ¶ 11). As a result, Local 150 represents employees at Hulcher Services, a company whose main business is re-railing derailed trains (*id.*). The employees in the Local 150 bargaining unit

operate heavy equipment to re-rail trains and clean up after a derailment (*id.*). Hulcher has a facility in Atlanta, Georgia (*id.*).

In January of 2012, Hulcher terminated a Local 150 bargaining unit employee at the Atlanta location for use of the "n" word (Sweeney Cert. ¶ 12). Pursuant to the Georgia "Right-to-Work" law, the employee, like almost 90 percent of the unit, had chosen not to become a dues paying member of Local 150 or a fair share fee-payer (*id.*). The facts of the case strongly suggested to Local 150 that Hulcher lacked just cause to terminate the employee, so Local 150's railroad industry Business Representative John Sorensen filed a grievance (*id.*). The case proceeded to arbitration in Atlanta and was referred to Local 150's in-house Legal Department in Countryside, Illinois (*id.*). The Union ultimately prevailed, winning the grievant reinstatement and backpay and benefits in excess of $27,000.00 (*id.*).

John Sorensen spent about twelve to fifteen hours of time processing and trying to settle the grievance (Sweeney Cert. ¶ 13). In-house counsel spent approximately thirty-five hours on the case, including preparation for hearing, air travel to Atlanta, trying the case and writing a post-hearing brief (*id.*). This time, when added to airfare, lodging and meals for Mr. Sorensen and in-house counsel, the arbitrator's and court reporter's fees, and the cost for the conference room at the hotel for the hearing resulted in an approximate total cost to Local 150 of $8,750.00 (*id.*).

C. Indiana: Minteq

Local 150 represents employees of subcontractors who perform maintenance services and slag-processing in the steel mills in northwest Indiana (Sweeney Cert. ¶ 14). One such employer, Minteq, performed maintenance services at two steel-making facilities operated by Arcelor-Mittal at Indiana Harbor and Burns Harbor, Indiana (*id.*). For various reasons, each of these bargaining units is covered by its own collective bargaining agreement with the Union (*id.*).

Some time in 2013, Minteq transferred two employees from the Indiana Harbor facility to the Burns Harbor facility (Sweeney Cert. ¶ 15). One employee was a Local 150 member while the other was a non-member (*id.*). Both performed the same work in the same work classifications at each location (*id.*). Based upon the belief that the transfer was temporary, the Employer and the Union agreed to allow the two employees to continue to work under the wage rates and fringe benefits they earned at the original facility (*id.*). After almost one year, however, the Union objected and the Employer formalized the transfer so that the two employees worked under the Burns Harbor contract (*id.*). In so doing, however, the Employer assigned both employees a lower work classification which resulted in a modest pay-cut (*id.*).

On June 3, 2014, Local 150 Business Agent Mike Simms filed a grievance against Minteq over the change in classification and attendant reduction in pay to the two employees (Sweeney Cert. ¶ 16). The Employer ultimately upgraded both employees, gave them a raise in pay and $1,000.00 each in backpay (*id.*). In investigating, preparing, and advancing this grievance, Mr. Simms spent at least two days meeting with the employees, the Local Union Steward, and supervisory personnel from Minteq (*id.*). Based on his 2014 compensation and other related expenses, the cost to the Union of Mr. Simms's time is approximately $100.00 per hour (*id.*). Hence, the costs borne by the Union's members for pursuing this grievance totaled at least $1,600.00 (*id.*). Because one of the employees was a dues-paying member while the other was not, it seems fair to say that the dues-payer subsidized the free ride of the non-member, who received the same benefit.

D. Illinois: West Chicago

Perhaps the most extreme example of the cost to Local 150 of representing non-members is in an ongoing case in Illinois. Illinois is not yet a "Right-to-Work" state, but its Governor

considers compelled fair share fees unconstitutional, at least in the public sector, and filed a lawsuit seeking to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *See Rauner v. AFSCME Council 31*, Case No. 15 cv 1235 (N.D. Ill. filed February 9, 2015). Governor Rauner also advocated state legislation authorizing local governments to create "empowerment zones" which could, *inter alia*, pass "Right-to-Work" ordinances. Should either or both of these proposals come to pass, Board regulation of the chargeability of representation fees to non-members will impact Local 150 in Illinois as well.[3]

Local 150 represents public works employees in the City of West Chicago, Illinois (Sweeney Cert. ¶ 17). In October 2015, the Union filed a grievance over the Employer's decision to subcontract bargaining unit work, a decision which led to the layoff of at least one mechanic in the bargaining unit (*id.*). Represented by in-house counsel, Local 150 won an arbitration which awarded the employee three years' backpay (*id.*). In 2013, the Employer sued in state court to vacate the award (*id.*). With the assistance of outside counsel, in July 2014, the Union prevailed (*id.*). The Employer settled shortly thereafter (*id.*).

The mechanic laid off as a result of the Employer's contract violation was a dues-paying Local 150 member throughout his employment with West Chicago (Sweeney Cert. ¶ 18). He remained a member after he secured similar employment in another bargaining unit represented by Local 150 (*id.*). But in January 2013, he stopped paying dues (*id.*). To that point, the Union had spent thousands of dollars arbitrating the case and in staff time (*id.*). Outside counsel who helped win the court decision enforcing the arbitrator's award cost over $20,000.00 alone (*id.*).

[3] The Board's decision in this case may affect Illinois public sector employees because the Illinois State Labor Relations Board considers NLRB cases persuasive authority for its decisions. *See East Ridgeland Education Assn., IEA-NEA v. Illinois Educational Labor Relations Board*, 173 Ill. App. 3d 878, 902 (1988).

ARGUMENT

In *Beck*, the Supreme Court held that non-member employees are required to pay their pro-rata "fair share" of the representational services they receive. 487 U.S. at 745-746. Following *Beck*, the NLRB determined that consistent with their duty of fair representation, unions can charge non-members for expenses incurred that are germane to collective bargaining, including grievance-adjustment or contract-administration, provided they had sufficient notice of what the unions' expenses were and an opportunity to object. *California Saw & Knife Works*, 320 NLRB 224 (1995), *enf'd sub nom, Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998), *cert. denied sub nom, Strong v. NLRB*, 525 U.S. 812 (1998). As the Court observed in *Machinists*, the NLRA's union-shop proviso "is intended to prevent workers from taking a free ride on the union's efforts on their behalf (the union being required to represent all the members of the unit equally, whether or not they are union members)." The Court added (*id.*):

> It is hard to think of a task more suitable for an administrative agency that specializes in labor relations, and less suitable for a court of general jurisdiction, than crafting the rules for translating the generalities of the *Beck* decision (more precisely, of the statute as authoritatively construed in *Beck*) into a workable system for determining and collecting agency fees.

See also UFCW Local 700 (Kroger LP & Sands), 361 NLRB No. 39 (September 10, 2014).

The Board's authority to regulate fees charged to non-members is not altered by Section 14(b) of the Act. That section states (29 U.S.C. § 164(b)):

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Congress's use of the word, "membership," was deliberate. Its intent in enacting the Taft-Hartley amendments in 1947 was to abolish the closed shop requiring employers to hire only union members. *Beck*, 487 U.S. at 747-748. Congress, however, was "equally concerned" with free-

riders, and the likelihood that without union security agreements, "many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Id.* at 748. Hence, the Taft-Hartley amendments were "intended to accomplish twin purposes"—the elimination of the closed shop and to enable unions to prevent free-riders. *Beck*, 487 U.S. at 749, *relying on NLRB v. General Motors Corp.*, 373 U.S. 734, 740-741 (1963). As Senator Taft himself said, the legislation "in effect…say[s] that no one can get a free ride in such a shop. That meets one of the arguments for a union shop. The employee has to pay the union dues." *Beck*, 487 U.S. at 749 n.5.

In its "Brief of the National Labor Relations Board as *Amicus Curiae* in Support of Plaintiff" in *UAW Local 3047 v. Hardin County, Kentucky* (Case No. 3:15-cv-66, filed 04/17/15) at 7, the Board stated that the NLRA "extensively regulates union security." Relying on *Amalgamated Association of Street, Elc. Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971), the Board observed that, "Union security is 'a matter as to which…federal concern is pervasive and its regulation complex'." *Id.* The Board added further that Section 14(b) of the Act creates a narrow exception to this pervasive federal regulation of union security. *Id.* at 8-9.

Although its *Hardin County amicus* brief focuses on the meaning of the words, "State or Territory," the Board's observations as to the comprehensiveness of the NLRA's regulation of union security and narrowness of the 14(b) exception are instructive here. Congress did not authorize States to regulate union security agreements beyond those agreements requiring "membership" as a condition of employment. *See Sweeney v. Pence*, 767 F.3d 654, 671 (2014) (Wood, C.J. dissent), rehearing *en banc* denied by an equally divided panel January 13, 2015; *International Union of Plumbers and Pipefitters v. NLRB*, 675 F.2d 1257, 1262 (D.C. Cir. 1982)

(Mikva, J., dissenting). It is entirely appropriate for the NLRB to reoccupy this field by regulating the fees unions can charge non-members in "Right-to-Work" states.

A. The Board Should Reconsider Its Rule that Absent a Valid Union Security Clause, Unions May Not Charge Non-Members a Fee for Processing Grievances and Should Overrule *Machinists Local Union No. 697*.

Since *Hughes Tool*, the NLRB has ruled that unions in "Right-to-Work" states cannot charge non-members to represent them in grievances. 104 NLRB at 329; *see also Machinists Local Union No. 697 (H.O. Canfield Rubber Company)*, 223 NLRB 832, 835 (1976); *Columbus Area Local, American Postal Workers Union (U.S. Postal Service)*, 277 NLRB 541, 543 (1985) (state court lawsuit to collect unpaid grievance fees from non-members coercive and in violation of Section 8(b)(1)(A)). In determining whether a union could establish a fee schedule required of non-members in order to process grievances, the Board in *Hughes Tool* framed the issue as, "whether the imposition of these fees is in derogation of the duties of the bargaining representative to provide equal representation to all employees in the unit, or as only a justifiable measure to control and discourage 'free-riders'." 104 NLRB at 324. In finding a violation of Section 8(b)(1)(A), the Board explained (*id.* at 325-326):

> The certified representative's exclusive authority to bargain and represent may be achieved by virtue of the support of a bare majority of the employees in the appropriate unit. Discrimination in the performance of the duties of the representative designed to deny equal treatment to those of the minority is to subvert the privilege and rights granted by the statute. Whether such discrimination is based on union membership or the lack thereof, rather than on considerations of race, creed, or color is, in our opinion, irrelevant.

Thus, the Board concluded that, "The duty of the certified representative to render such impartial assistance is clearly evaded where some employees are forced to pay a price for such help or to forego it entirely. The latter result is precisely what occurs under the fee schedule set up by the independent." *Id.* at 327.

The Board's analogy to racial discrimination is inapt. While Section 8(a)(3) of the Act plainly makes it unlawful for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,"—a prohibition echoed in Section 8(b)(2)—discrimination based on membership is not the same as requiring employees to pay for services they receive. At no time did protesters in Greensboro, North Carolina, insist on service at the "whites-only" lunch counter for free. Housing discrimination "testers" do not usually seek free rent, just equal access. *See, e.g., Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985). At least since *Beck*, the Supreme Court has recognized that charging non-members for the services they receive is not discrimination under the NLRA. The Board reached the same conclusion in *California Saw & Knife*.

Nor is the union's status as the exclusive bargaining representative of any given bargaining unit somehow compensation for being forced to give non-members a free ride. Prior to the NLRA, craft workers struck employers for recognition, then took his best hands, who worked as union members thereafter under closed-shop agreements. *See, e.g.,* Garth Mangum, *History of the International Union of Operating Engineers*, at 138 (Harvard University Press, 1964). Industrial workers seized factories in sit-down strikes which organized hundreds of thousands of workers in the Great Depression. Robert H. Zieger, *The CIO 1935-1955*, at 46-54 (Univ. of North Carolina Press, Chapel Hill, N.C., 1995). Because these tactics were so effective, they are now unlawful. Unions were not the advocates of an "exclusive representative" status bestowed upon them by NLRB elections. Mangum, *supra*, at 138 ("the procedure [under the NLRA] of organizing employees by persuading them to vote favorably in a formal election was foreign to the IUOE experience."); *see also* Charles J. Morris, *The Blue Eagle at Work*, at 5 (Cornell Univ. Press, Ithaca, N.Y., 2005) (in the 1930s, 85 percent of Steelworker contracts and 64 percent of UAW contracts

were "members-only" agreements where the union represented only a minority of workers). Unions can accept the obligation to represent all employees fairly as implied by exclusive-representation status. Doing so for free is a different question.

Unions should not be punished for exclusive representation in part because unions are not the sole beneficiaries of that status. At its inception and in practice, the principle of exclusive representation was not of exclusive benefit to the union. Section 9(a) of the NLRA states (29 U.S.C. § 159(a)):

> **(a) Exclusive representatives; employees' adjustment of grievances directly with employer**
>
> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

It is the principle of majority rule established by Section 9(a) that is central to the policy of promoting collective bargaining. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Exclusive representation serves the interests of all parties to the collective bargaining process and advances the National Labor Policy in favor of collective bargaining. Of course, the union's exclusive representative status benefits all employees that it represents. As the Supreme Court explained in *Emporium Capwell Co. v. Western Edition Community Organization*, 420 U.S. 50, 62 (1975), "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power…" Employers likewise benefit because they can establish a uniform set of wages and working conditions through

negotiations with a single bargaining representative. As Senator Robert Wagner explained, "It is well nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit." S. Rep. No. 74-573, at 13 (1935) [79 Cong. Rec. p. 75-71 (1935)]. Exclusive representation also promotes collective bargaining because, as Chairman Francis Biddle of the pre-NLRA NLRB observed, "Without majority rule, bargaining would result in the playing-off of groups against each other, resulting in no agreement. Actual collective bargaining in industry has always been conducted on the theory that a bargain made with one group in a unit sets the standard for the entire unit…" Hearings, 74th Cong., 1st Sess., on S. 1958, p. 81 (1935), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, p. 1455 (1935).

The Board should overrule *Machinists Local Union No. 697* at least in part because it rests on a false premise that it is discriminatory to require non-members to pay their fair share of the costs of representation. As the Board explained in *Machinists Local Union No. 697* (223 NLRB at 834):

> Involved here is a *quid pro quo* which Congress made basic to the Act. The Act requires an employer to bargain in good faith with a duly selected exclusive bargaining representative, despite the fact that a substantial minority in the unit may not want to be represented by that particular union or any union at all. In exchange for the protection of the Act, the bargaining representative must represent all unit employees.

In *Beck*, however, the Supreme Court made it clear that unions need not "represent all unit employees" for free. And as explained, *supra*, exclusive representative status is the result of Congress's decision to establish a "winner take all" system based upon majority rule, not simply a benefit to the union requiring it to support free-riders.

B. The Board Should Consider the Actual Cost of Representing Non-Members in Determining what Fees a Union Can Charge Them.

The calculation of representation fees chargeable to non-members should begin with a recognition that a mature collective bargaining agreement is the product of years of evolution financed by dues-paying members and fair share fee-payers. The wages, hours, benefits, and other terms and conditions of employment did not magically appear, but are often instead the result of generations of effort by unions and their members and their collective bargaining strength. Non-members who have contributed nothing to the union's bargaining power and evolution of its agreements should not be permitted to insist upon the union's services for free.

Calculating reasonable representational fees next must take into account the actual costs incurred by unions in processing and arbitrating grievances. The NLRB explained well the value of union representation to employees in grievance-processing in *Hughes Tool*, 104 NLRB at 327-328:

> There are obvious reasons why the assistance of the certified labor organization is of great value to an employee with a legitimate grievance. The established procedures and experienced personnel which the union has at hand; the background of preceding cases and knowledge of the contract stemming from participation in its negotiation; and the very prestige and authority of the union itself are all factors which may well mean the difference between the success and failure of the grievance.

Investigation into the validity of a grievance usually involves time spent by paid staff. Consultation with legal counsel is often necessary to determine whether a grievance is meritorious. Preparation for hearing again involves valuable time by business agents and lawyers. Arbitrators and transcription fees easily run into the thousands of dollars for a single case.

Board cases often characterize union efforts to charge fees for their representational services as "arbitrary" and not "fair and equitable" because those fees exceed monthly dues charged members. *See, e.g., Hughes Tool*, 104 NLRB at 328 and n.25. But members pay for their

union's services over their entire career. When he worked as an Organizer, Local 150 President-Business Manager Jim Sweeney told employees that Union membership was akin to an insurance policy (Sweeney Cert. ¶ 19). In addition to providing wages and fringe benefits, the Union would protect individual employees when their job security was threatened. Ideally, employees would never need the assistance of the Union in challenging an unjust discharge or unfair layoff. But if the need arose, they could avail themselves of that protection.

Arbitration of grievances costs real money. Sweeney estimates that a single arbitration could cost the Union $3,000.00 in out-of-pocket expenses alone (Sweeney Cert. ¶ 20). A Local 150 member working full time in the Indiana steel mills would pay about that amount in dues in one year (*id.*). Allowing non-members to shift that cost to the Union's members is truly arbitrary, unfair, and inequitable. Congress recognized a similar "cost-shifting problem" in healthcare as a basis for the individual mandate of the Affordable Care Act. *National Federation of Independent Business v. Sebelius*, 567 U.S. ---, 132 S.Ct. 2566, 2585 (2012). It is appropriate for the NLRB to recognize and address that problem here.

It is not a breach of the union's duty of fair representation to consider the cost in its decision whether to take a grievance to arbitration. *See Moore v. Sunbeam Corp.*, 459 F.2d 811, 820, n.20 (7th Cir. 1972). Requiring non-members to pay the full cost of processing their grievances may very well encourage union membership (although not necessarily, because such individuals always have the option to become only fair share fee-payers), but only because it is the financially prudent thing to do. By spreading the cost over time, and the entire group, individual employees are better able to afford the union's services. If individual employees prize their independence and choose to risk their employment in order to save modest "insurance" payments, then they should pay the full cost when the gamble fails.

Finally, enforcement of such a payment obligation should be left to private agreement between the union and the individual employees it represents. The NLRA specifically provides for individual employees to adjust their own grievances. 29 U.S.C. § 159(a). This option was what convinced the Supreme Court of Nevada that fees charged non-members by the union did not violate that state's "Right-to-Work" law. "Implicit in the plain language of [the statutory provision authorizing non-members to act on their own behalf] is the requisite that a non-union member pay for pursuing his or her own grievance, even if such payment is made to the union." *Cone v. Nevada Service Employees Union/SEIU Local 1107*, 998 P.2d 1178, 1181-1182 (Nev. S. Ct. 2000). Non-member employees who retain an attorney to represent them in a grievance procedure would likely do so on an individual fee agreement or perhaps a contingency arrangement. That arrangement would be enforceable between those parties in state courts; the union should be entitled to the same remedy.[4]

[4] This result, of course, would require the Board to overrule explicitly *American Postal Workers (Postal Service)*, 277 NLRB 541 (1985).

CONCLUSION

For all the above-stated reasons, the International Union of Operating Engineers, Local 150, AFL-CIO, urges the Board to reconsider its rule that unions cannot charge non-members processing fees, overrule *Machinists Local Union No. 697*, and authorize unions to charge non-members the actual cost of representation in grievance-processing.

Respectfully submitted,

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The undersigned hereby certifies that on May 28, 2015, he electronically filed the foregoing with the National Labor Relations Board, and served copies on the following via electronic mail:

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